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Supreme Court, U.S.
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No. 99-1582

In The

Supreme Court of the United States

DELLA J. BROWNING & JAY ELEDGE
Petitioners

vs.

ROHM AND HAAS COMPANY
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

I.

The Lower Courts Correctly Applied Established Legal Principles in Holding that Rohm and Haas was Entitled to Summary Judgment

II.

The Issues in the Instant Case are Not Similar To Those In Reeves v. Sanderson Plumbing Products, Inc., and do Not Warrant Granting the Petition

Corporate Disclosure Statement

In accordance with Supreme Court Rule 29.6, the Respondent, Rohm and Haas Company, is a publicly-owned corporation. No publicly held company owns 10% or more of the corporation's stock.

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Statement of the Case

Petitioners Della J. Browning and Jay Eledge last worked for respondent Rohm and Haas Company in 1982 when they were laid off in a reduction in force in the plexiglas department of respondent's plant in Knoxville, Tennessee. Petitioners brought this action alleging that respondent violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 et seq. by failing to rehire them when, fourteen years later, in 1996, they applied for work as chemical operators. JA 10-16.[1]

The district court granted summary judgment in favor of respondent on all claims. It did so because: (1) petitioners' contractual recall/rehire rights had expired; (2) there was no direct evidence that petitioners were not hired because of their age; (3) petitioners did not meet any of respondent's hiring criteria and hence failed to establish that they were qualified as chemical operators, an essential element of their prima facie case; and (4) even assuming a prima facie case had been established, there was no evidence that respondent either adopted its hiring criteria for discriminatory reasons or applied them in a discriminatory way. App. 15a-22a.

In the district court petitioners attempted to establish their age discrimination claims under both disparate treatment and disparate impact theories and on the basis of contractual rehire rights. On appeal to the United States

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[1]Citations to "App." are to the appendix to petition for certiorari. Citations to "JA" are to the joint appendix filed with the court of appeals.

Court of Appeals for the Sixth Circuit, petitioners abandoned their disparate impact claims and their claims based on contractual rehire rights. App. 7a n.2. The court of appeals affirmed the district court's grant of summary judgment on the remaining disparate treatment claims for two reasons: because petitioners "failed to establish, both, [1] that they were qualified, and [2] that the hiring criteria were intended as a pretextual barrier." App. 14a.

Statement of Facts

Petitioners have significantly misstated the evidence and ignored material and undisputed facts deemed relevant by respondent and both lower courts. Because the case cannot be understood from the facts as stated in the petition, respondent believes it is necessary to restate the facts.

1. Respondent Rohm and Haas came to Knoxville during World War II to produce acrylic sheet ("plexiglas") for military aircraft at a government-owned plant. After the war, respondent purchased the plant and established a separate chemical department in which emulsions and low molecular weight polymers were manufactured. App. 16a-17a, JA 254. The plexiglas department was closed in 1987; the chemical department has continued to date. From the outset, hourly-paid employees in the Knoxville plant's chemical and plexiglas departments have been covered by collective bargaining agreements (CBAs) containing provisions establishing seniority and recall rights applicable to both departments. App. 3a, 17a, 19a, JA 183-185, 257.

2. Throughout their employment at respondent's Knoxville plant, petitioners worked in the plexiglas department, Browning from 1976 until March 1982, in

unskilled jobs, Eledge from 1969 to March 1982, in semi-skilled jobs. Neither ever worked in the chemical department.[2] App. 2a, 17a & 8a. As petitioner Eledge said, "I have experience on the plexiglas side ... but not on the chemical side of Rohm and Haas." JA 127.

3. In the late 1970's Rohm and Haas began to feel the impact of low cost acrylic sheet produced overseas. The ensuing decline in the sale of acrylic sheet caused a series of layoffs in the plexiglas department in 1982 and the eventual closure of the department in 1987. Petitioners and 179 other employees were laid off in the 1982 reductions in force. When the plexiglas department was permanently closed in 1987, the jobs formerly held by petitioners were abolished. App. 3a, 19a, JA 255-256.

4. Under the CBA employees laid off from the plexiglas department in 1982 had recall rights, based on seniority, for three years. Subsequent negotiations established preferential rehire rights for these employees for an additional four years, that is, until 1989. Petitioners' seniority rights were such that they were never recalled or rehired; hence, their employment relationship with respondent ended in 1989 upon the expiration of their preferential rehire rights. Employees laid off in 1986-87 as a result of the closure of the plexiglas department had the

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[2]Petitioners fail to state that the plexiglas department was entirely separate and distinct from the chemical department or that their former positions had been abolished with the closure of the plexiglas department in 1987. Neither do they mention the major differences in the nature and relative complexity of the work in the two departments or the unskilled or semi-skilled nature of their work in the plexiglas department.

same recall/rehire rights as petitioners and the others laid off in 1982. App. 3a, 19a-20a, JA 183-186, 406.

5. During 1986-88, respondent offered employment at its other plants to hourly workers at the Knoxville plant, including workers scheduled for layoff as a result of the closure of the plexiglas department. Those who accepted this offer relinquished their recall/rehire rights at Knoxville. In the 1986-88 time period, 55 employees accepted the offer. The same offer had been made to petitioners in 1982, but both elected not to accept it. App. 2a, 3a n.1, 16a-17a, 26a, JA 187-88.

6. Plexiglas was a manual operation characterized by unskilled and semi-skilled jobs that required minimal training ranging from one to 30 days. In contrast, jobs in the chemical department were always more complex; consequently, those jobs required significantly more and different training, the need for which increased with the introduction of computerized equipment into the department in the late 1980's. Since 1987 Rohm and Haas has spent over $40 million on new computerized equipment in the chemical department at the Knoxville plant; as a result, the department is a world class operation, which now produces many more and different chemical products than it did in 1987. App. 17a-18a, 35a-36a, JA 186-87, 254-255.

7. As discussed later, infra ¶¶ 8-10, the Knoxville plant developed a set of hiring criteria for chemical operators in 1993. The petition neither discusses respondent's reasons for adopting the hiring criteria nor acknowledges the study that preceded their adoption. In 1987, many senior plexiglas employees without experience

as chemical operators displaced less senior chemical employees in the chemical department by reason of their seniority rights under the CBA. In anticipation of the closure of the plexiglas department in 1987, respondent and the union agreed a year earlier to transfer senior plexiglas employees in groups of ten for training in the chemical department.[3] The plan to fully train each group of former plexiglas employees in a two month period proved inadequate, however, for despite their experience in the plexiglas department, these employees were unable to learn the skills needed for chemical department work in the allotted time. For this reason, the training methodology of the former plexiglas department employees had to be changed. Under the new plan, each group was trained in a different, narrow segment of the work and then assigned to do that work. From this experience - and from the fact that work in the two departments was so fundamentally different - it became evident to management at the Knoxville plant that work in the plexiglas department did not prepare an employee for work in the chemical department. App. 9a, 19a, 23a-24a, JA 257-58.

8. The introduction of computers and computer-automated equipment that began in the late 1980s required still more training of chemical department employees. Respondent's training director described it this way (App. 4a, 9a, 20a, 36a-37a, JA 258-59):

> Since 1987 the typical employee in the Chemical Area must have the knowledge and skill to work

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[3]Like numbers of junior chemical operators were moved to the plexiglas department where they worked until they were laid off when the department closed. JA 258.

> with computers to operate large chemical reactors and other large chemical vessels. The employee must also have knowledge of organic chemistry and mathematics. . . . Serious environmental impact, a very large time and material cost, and potential safety hazards can occur if there is a mistake by the operator. . . . Being able to control the chemical reaction and troubleshooting the production process is vital. . . . The training provided on site beginning in late 1987 was in the use of computers and of mathematics and organic chemistry.

Management at the Knoxville plant believed its chemical operators "must be able to understand, work with and operate through computer based controls independently and with a minimum of supervision." App. 9a, 37a, JA 288.

9. From 1979 to 1993 respondent hired no new hourly employees at the Knoxville plant. In February 1993, because of anticipated retirements, management at the Knoxville plant appointed a committee to determine appropriate hiring standards that would apply to the hiring of new chemical operators.[4] By 1993 all the hourly-paid

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[4] Petitioners contend that adoption of the criteria in the context of expected retirements of aging employees warrants an inference of age discrimination. Petition p. 15. This argument ignores that aging is a fact of life and often a fact of a stable work force. Here the company, having hired no one for fourteen years during which its chemical operation had undergone great change, and having hired or offered employment to all employees whose recall/rehire rights had not expired, sought to establish criteria by which qualified replacements could be hired. The record will bear no other interpretation. The court of appeals quite properly quoted with approval the district court's opinion that: ". . . an employer is 'entitled to

employees who were laid off in 1986-87 as a result of the closure of the plexiglas department had been either recalled, rehired or offered employment.[5] The committee concluded, first, that respondent did not have the expertise, nor could it afford, to provide the in-house training needed to develop skills for chemical operators in a reasonable time. Next, after considerable study, the committee concluded that applicants should be computer literate and have a knowledge of organic chemistry and mathematics so that respondent could provide production-specific training in house once new chemical operators were hired. Before reaching these conclusions, the committee conferred with an Alabama firm that utilized a post-secondary school to train a pool of applicants for chemical operator jobs. This led to talks with Pellissippi State Technical Community College, in Knoxville, and ultimately to a review of the curriculum and books used in the school's chemical and environmental engineering program. As the Sixth Circuit noted, Pellissippi State's curriculum includes "chemistry, computer programming for engineers, technical math, calculus, physics, organic chemistry, chemistry engineering materials, unit operations, hazardous site control, basic electronics, as well as English composition." The committee concluded that with some new material (which

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improve the quality of its workforce by hiring persons with more experience and/or education than has been required before, especially in a chemical plan with rapidly expanding technology.'" App. 12a.

[5]Petitioners fail to mention the existence and the significance of contractual recall/rehire rights in this case, or that by reason of those rights no new employees were hired during the 14 years ending in 1993; nor do they mention the vast change in the business of the company during that period.

the school agreed to provide) the program was directly relevant to the chemical operator position at the Knoxville plant.[6] App. 3a-4a, 9a-10a, 20a, JA 185-86, 259-63.

10. At the conclusion of its study, in November 1993, the committee recommended, and management adopted, the following criteria for the Knoxville plant (App. 4a-5a, 20a-21a):

> Due to the complex demands of operating a chemical plant in an increasingly competitive environment, we have established the following requirements for those applicants seeking hourly production jobs.
>
> An Associate Degree in Chemical and Environmental Engineering Technology from Pellissippi State (or equivalent degree from another school), or
>
> Five years of relevant experience in chemical plant operations or
>
> A relevant four year degree from an accredited college or university.

11. In addition to the affidavit of expert Michael Hudson, discussed in n. 6, supra, p. 8, the record contains the affidavit of a second expert, Kenneth Chapman, now retired, who for some 30 years was employed by the

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[6]The record contains the affidavit of Michael Hudson, a Pellissippi State professor, with experience in job validation. Hudson worked with the committee on the content of the course and is familiar with the work of the company's chemical operators. He is of the opinion there is a high correlation in the curriculum and the work of chemical operators. JA 269.

American Chemical Society ("ACS"), a nonprofit professional organization based in Washington, D.C. In the 1990's, Chapman, on behalf of ACS, managed a federally funded national study of the chemical process industry (the industry respondent is in) and of the skills and knowledge needed by chemical operators entering the industry. This study found that there has been a rapid increase in the job requirements of chemical operators in the area of computer, communications, scientific, and technical knowledge and skills and that new workers must bring this increased knowledge and skills to the workplace. The ACS study, contained in a 400-page book, concluded that the chemical process industry needed entry level operators with much better knowledge and skills than their predecessors' and that entry level process technical operators are expected to have performance-based skill standards in the areas of mathematics, statistics, computer literacy skills, communication skills and workplace skills, and general plant skills. This data was validated by more than 440 reviewers.

12. In his affidavit, the ACS' Kenneth Chapman expressed the opinion that respondent's hiring criteria are job related and consistent with business necessity. Although respondent did not know of the ACS study when it adopted its own hiring criteria in 1993, the conclusions reached by the ACS study fully support respondent's view that the criteria are needed. The ACS study is also highly relevant to the lower courts' conclusion that respondent's adoption of the hiring criteria was not pretextual. This ACS study was twice referred to by the court of appeals, and by the district court as well. Yet there is not so much as a

mention of this important evidence in the petitioner's statement of facts. App. 9a-11a, 21a-22a, JA 134-139.

13. In 1993, just before adopting the hiring criteria, respondent's Knoxville plant decided to offer jobs to the 55 former Knoxville plant employees who had transferred to other Rohm and Haas plants in 1986-88 (See supra ¶ 5), all of whom, by then, had at least five years of relevant experience in a chemical plant.[7] Respondent had no legal obligation to make this offer to those former Knoxville plant employees. Thirty-one of these employees accepted the offer and filled vacancies in the Knoxville plant (after all employees with recall/rehire rights had been offered employment or rehired) between March 1, 1993, and January 10, 1994. Their average age was 52. App. 3a-4a n.1, 26a, JA 187-188.

14. Respondent began using the hiring criteria in September 1994.[8] It is undisputed that every chemical

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[7]Petitioners misstate the facts relating to these employees by failing to mention that they were all former Knoxville employees. Furthermore, petitioners equate their own experience "at a chemical plant," i.e., in the plexiglas operation, with the experience of the 31 employees who accepted respondent's offer and returned to Knoxville. Petition, p. 3. While the criteria were not in effect at the time the offer to return was made, these employees had worked in chemical operations at the Bristol, Pennsylvania, and Louisville, Kentucky, plants at which plexiglas operations had been closed; and at the Houston, Texas, plant, where plexiglas had not been produced. JA 187, 256.

[8]The Knoxville plant did not directly receive applications for employment. Since 1994, the company has used the Tennessee Department of Employment Security (TDES) and the Knoxville Urban League (KUL) to recruit applicants by advertisements and contracts with other agencies and to receive applications. TDES and KUL then send applications that appear to meet one of the criteria to the company for its review and screening. JA

operator hired since then has, without exception, met one or more of the criteria. There has been no disparate treatment in the use of the hiring criteria. As noted by the court of appeals, from September 1994 until August 1998 (the date of the district court's opinion) there were 81 new hires, 14 of whom (17.28%) were over age 40.[9] By mid-1997, the company employed 208 hourly paid employees at the Knoxville plant, 140 of whom (72%) were over age 40. The average age of hourly paid plant workers was 49. App. 12a-13a, 26a-28a.

15. Browning and Eledge did not apply for employment at the Knoxville plant until July 8, 1996 and September 17, 1996, respectively. Earlier, in March 1996, after learning that respondent was hiring chemical operators, petitioners arranged a meeting with the union at which they claimed the CBA entitled them to rehire. When the union told them their rehire rights had expired, Eledge filed an unfair labor practice against the union (failure "to take action regarding the employer breaking its agreement. . .") which the NLRB dismissed.[10] Then, on July 1, 1996 (even before applying for employment), petitioners filed a charge of age discrimination against respondent with the EEOC. The

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132, 190-91.

[9]The court of appeal noted that from September 1994 through July 1, 1996 (the date petitioners filed their EEOC charge) respondent had employed 40 employees at the Knoxville plant under the hiring criteria, 5 of whom (12.5%) were over age 40. By that date the number of new hires at Knoxville totaled 72, of these 36 were over age 40, including the 31 respondent had had no obligation to rehire. App. 3a-4a n.1, JA 187 ¶ 10.

[10]Eledge filed an affidavit with the NLRB saying he did not meet the criteria but that the criteria "had nothing to do with job skills." JA 126-27.

EEOC, finding no evidence of age discrimination, dismissed the charge. App. 5a-6a, JA 192-93.

16. Respondent did not consider work experience in the plexiglas department to be "relevant experience in chemical plant operations" within the meaning of its hiring criteria. JA 192. Respondent found that petitioners - and others similarly situated - did not meet the hiring criteria by reason of their employment in the discontinued plexiglas department.[11] And it was solely because petitioners did not meet any of the criteria that respondent declined to hire them for chemical operator positions. JA 132. There were several reasons why respondent did not consider experience in the plexiglas department relevant: one was because of the objective differences between the work of employees in the plexiglas and chemical departments; a second was because of the empirical evidence gleaned in 1986-87 from the difficulty respondent had experienced in training of former plexiglas employees who had used their seniority to transfer into the chemical department (from which management concluded that experience in plexiglas work did not prepare employees for work in the chemical department); and a third was because of the thorough study done by the committee in the process of making its recommendations for the hiring criteria in 1993. The

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[11]Petitioners argue that respondent's Assistant Human Resources Director, "who has no work experience as a 'chemical operator,'" removed petitioners' applications from the hiring process, thereby implying that it was the Assistant Human Resources Director who made the decision that petitioners' work in the plexiglas department was not "relevant experience." Petition p. 4. This is patently wrong. The decision that work in the plexiglas department was not relevant was made by other management personnel at the Knoxville plant as well. JA 192 ¶ 16, 257-258 ¶15.

district court found that respondent had presented "overwhelming evidence" in support of the conclusion that plexiglas work experience is not relevant: "Nothing the [petitioners] did while working in the plexiglas operation prepared them to be chemical operators." The Sixth Circuit agreed: "The district court correctly held ... that Rohm and Haas management appropriately determined in its business judgment that the [petitioners'] prior experience in its plexiglas operation did not satisfy the new hiring criteria for chemical operators." App. 9a, 38a-39a.

17. Petitioners assert that there is a genuine issue of material fact because (the argument goes) the company, having screened their applications without interviews, was therefore unable to assess the relevance of their experience since their layoff in 1982. Petition p. 5-6. The answer to this contention is found in petitioners' employment applications (JA 236-240) which show, beyond argument, that since their layoff, in 1982, neither had gained relevant experience in a chemical plant or obtained any kind of educational degree that would enable them to meet any of the hiring criteria. Browning had worked on an assembly line job as an inspector, Eledge as a self-employed excavating contractor. JA 236-246.[12]

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[12]Two former plexiglas employees had worked in a chemical plant (not a Rohm and Haas plant) since their layoff in 1982 and had thereby gained five years' relevant chemical plant experience. One (age 47) applied for employment in 1994, the other (age 50) in 1995. Both were employed. JA 193-194. Petitioners contended below that five other former plexiglas employees were qualified and applied but were not employed. The non-discriminatory (and undisputed) reasons these applicants were not employed are listed by the district court. App. 26a-27a n. 7, see also JA 407.

18. The hiring criteria implemented in 1994 have proven to be an unqualified success. New employees hired under the criteria have been trained in half the time needed to train former plexiglas employees who transferred to chemical in 1986-1987 (at an estimated savings in training costs of over $870,000) and have learned to troubleshoot effectively in much less time. App. 11a, 23a, JA 264-65.

19. Petitioners claim the affidavits of four retired employees, one a former first-line supervisor, establish that the hiring criteria were pretextual and that their work in the plexiglas department qualified them for the chemical operator's job. JA 326, 375, 378, 381. The affiants believe the job of chemical operator is much easier than before ("all the operator has to do is punch a few keys on the computer. . .") JA 378-380; that prior computer training is "neither required nor unimportant," JA 383; that "[i]f you can read, you are trained on the keyboard. . ." JA 376, 384; that with on the job training plexiglas employees laid off in 1982 "could do just as well" as employees hired under the criteria, id.; that "previous education and/or training would make no difference." JA 378-380; and that employees from Pellissippi State were as hard to train because "they had never worked at a public job" JA 383. Another retired employee, a former trainer who had prepared product "recipes" or manuals no longer in use, (JA 401), acknowledged the company was providing less structured classroom training to the new employees than before, and observed that the company was, in effect, "buying" education and experience. He disagreed with this concept because, in his opinion, education did not help a person be a better chemical operator. App. 41a-42a, JA 435. Both the district court and the court of appeals correctly found that

these affidavits missed the point in that they "merely revealed reasonable differences in opinion that did not raise issues of fact relevant to a summary judgment determination." App. 11a-12a, 41a-42a.

20. Petitioners would also infer discrimination from the following:

a) Prior to May 8, 1996, the company had an apprentice program for applicants age 47 and under. Petition p. 5. Until then a program of this type was exempt from age discrimination laws. See 61 Fed. Reg. 15378 (April 8, 1996), amending, 29 C.F.R. § 1625. The United States Department of Labor expressly approved the company's program. Use of the age limitation was discontinued by the company when the EEOC rescinded the exemption. JA 407. Petitioners do not explain how unlawful age discrimination can be inferred from the use of an exemption expressly permitted by law. JA 407, 411.

b) Petitioners maintain that the criteria were adopted at only one other Rohm and Haas plant. Petitioners misstate the record. The Louisville, Kentucky, and Bayport, Texas, plants have adopted similar criteria and, at the close of the record, most other Rohm and Haas plants in North America had them under consideration. Petitioners also say "the plant" where similar criteria were adopted "has a large number of former workers who were laid off when the company moved its plexiglas operation to Mexico." Petition pp. 8, 16. As noted, the company has a plexiglas plant in Mexico. Otherwise, however, this pejorative statement has no support in the record, including at the pages cited by petitioners. App. 43a, JA 401, 410.

c) Petitioners contend that they were given the "run around" when they sought to make known their interest in applying for work at the Knoxville plant and that the company failed to inform their group of the criteria and of job openings. Petition p. 7. As to the first contention, respondent delegated the application process to the Tennessee Department of Employment Security and Knoxville Urban League; and as for the second contention, respondent had no obligation to notify former employees, last employed fourteen years earlier, whose recall/rehire rights had ended. The court of appeals rightly found these and related arguments "unpersuasive." App. 31a, n. 4, 14a, JA 100.

21. After carefully scrutinizing the entire record, both lower courts found that petitioners had "failed to prove that Rohm and Haas' stated reasons for adopting the new hiring criteria and not hiring Browning and Eledge were merely pretextual." App. 2a. And both "rejected the [petitioners'] claim that the new hiring criteria were unnecessary and merely a pretextual barrier to hiring older workers." App. 6a. The Sixth Circuit said "the district court appropriately recognized that an employer is 'entitled to improve the quality of its workforce by hiring persons with more experience and/or education than has been required before, especially in a chemical plant with rapidly expanding technology.'" App. 12a. "In response to the [petitioners'] claim that the hiring criteria were merely pretextual," the Sixth Circuit said, "the district court correctly recognized that Rohm and Haas' perceived need for more highly qualified and educated chemical operators was a well reasoned business judgment that the hiring criteria were job related in light of the rapidly evolving world of chemical

operations." App. 10a. Accordingly, the court of appeals concluded that "the implementation of the new hiring criteria was not a veiled effort at screening out older applicants." Id.

22. Both courts cited with approval the American Chemical Society's study and the opinion of its project manager that the hiring criteria "should substantially increase the efficiency and productivity of the chemical operation, as well as reduce costs." App. 11a Both courts also cited the empirical evidence that the criteria had been "'an unqualified success from both a cost and performance standpoint ...'" Id. The record contained "'overwhelming evidence' that the new hiring criteria were motivated by legitimate non-discriminatory reasons based upon the company's business judgment that it needed to hire more qualified chemical operators ..." App. 6a-7a.

Argument

I.

The Lower Courts Correctly Applied Established Legal Principles in Holding that Rohm and Haas was Entitled to Summary Judgment

The legal principles governing this case are well-settled.

This is a disparate treatment case under the ADEA in which petitioners do not claim to have presented any direct evidence of age discrimination. Absent direct evidence, the courts of appeals have uniformly applied the "basic allocation of burdens and order of presentation of proof" adopted in McDonnell Douglas Corp. v. Green, 411 U.S.

792 (1973). As explained in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981):[13]

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id., at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

450 U.S. at 252-53; see also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993).

Petitioners' assert that McDonnell Douglas "and its progeny describe[d] three distinct stages to the proper inferential proof analysis." Petition p. 21. Whatever petitioners may mean by this, McDonnell Douglas "did not purport to create an inflexible formulation" or establish "discrete elements of proof." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977). McDonnell Douglas recognized "the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an

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[13] In O'Connor v. Consolidated Coin Caterers Corp., 517 U.S.308, 311 & n.2 (1996), this Court stated that it has "never had occasion to decide whether that application [McDonnell Douglas/Burdine] of the Title VII rule to the ADEA context is correct." The Court need not address the issue in the context of this case.

employment decision was based on a discriminatory criterion illegal under the Act." Id. At least three times, this Court has emphasized that:

> The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)); quoted in St. Mary's Honor Center, 509 U.S. at 519; see also Price Waterhouse v. Hopkins, 490 U.S. 228, 288 (1989) (Kennedy, J. dissenting).

It is only by exalting form over substance and by misstating the Sixth Circuit's decision (as well as the district court's) that petitioners can assert that the lower courts "failed to heed this Court's directives [and] undermined the purpose and structure of the inferential proof method." Petition p. 19-20. On the contrary, it is petitioners' who misapply the McDonnell Douglas/Burdine formula.

The crux of petitioners' argument concerns the Sixth Circuit's conclusion that they failed to establish a genuine issue of fact as to whether they were "qualified" for the position of chemical operator. Petitioners contend that the court of appeals "focus[ed] solely on the prima facie case" and therefore erroneously held "that the petitioners were not qualified for purposes of establishing a prima facie case. . . ." Petition p. 19. According to petitioners, the

courts below required them to meet the respondent's "standard in all of the areas deemed relevant." Petition p. 19. Petitioners assert the court of appeals "should have examined the petitioners' evidence independent of the nondiscriminatory reason." Petition p. 21. Petitioners are thus claiming that the court of appeals merely accepted the respondent's hiring criteria for the chemical operator position without question. But as explained below this contention mischaracterizes the court of appeals' decision.

Momentarily assuming (solely for the sake of argument) that the court of appeals erred in applying the McDonnell Douglas/Burdine prima facie case, this purported error does not warrant granting their petition. A "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court Rule 10. The petition does not assert, much less establish, that the lower courts are divided on whether the employer's nondiscriminatory reason may be considered as part of the prima facie case.[14] Moreover, even if, as part of the prima facie case, a court is not supposed to consider the employer's nondiscriminatory reason, the petition fails to demonstrate that the result in this case would be any different.

Petitioners' argument fails for want of its premise: neither the Sixth Circuit nor the district court improperly applied the McDonnell Douglas/Burdine prima facie analysis. Petitioners repeatedly chastize the lower courts

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[14] Indeed, the petition claims that even the Sixth Circuit properly applied McDonnell Douglas/Burdine in a subsequent decision. Petition p. 20-21, citing Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000).

for "considering the employer's nondiscriminatory reason in connection with the plaintiffs' establishment of a prima facie case." Petition, p. 20, see also p. 18-19, 21. But the Sixth Circuit did not merely hold that the petitioners' failed to establish a prima facie case. It also considered whether respondent's hiring criteria were "a veiled effort at screening out older applicants" and held that there was "no evidence of any age discrimination. App. 10a, 12a.[15]

While the lower courts did not confine themselves to issues relating to the prima facie case, petitioners' contention that a court may not consider "nondiscriminatory reasons" during the prima facie case not only flies in the face of "common experience," Aikens, 460 U.S. at 715,[16] but is also contradicted by the decision relied upon by petitioners. Petition p. 21. In Burdine, this Court explained that one of the "important functions" served by the prima facie case was to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection." 450 U.S. at 253-54.

The lower courts neither accepted without question the hiring criteria relied upon by respondent nor imposed an "onerous" prima facie standard on petitioners. Id. The lower courts' decisions merely demonstrate, as Burdine indicated, that a court cannot ignore the "nondiscriminatory

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[15]Petitioners' characterization is even more inaptly applied to the district court's decision which unquestionably analyzed the "qualifications" issue in both contexts. App. 33a-34a.

[16] See also Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997) ("A little common sense is not amiss in a discrimination case.")

reason" an applicant was found to be unqualified for a certain position.

The prima facie case issue notwithstanding, petitioners' also fail to acknowledge that both of the lower courts gave them a "full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for [their] rejection, the decision was in reality" based upon their ages. McDonnell Douglas, 411 U.S. at 805, n. 18; accord Burdine, 450 U.S. at 256; St. Mary's Honor Center, 509 U.S. at 517-18. But petitioners failed to present competent evidence that the hiring criteria discriminated against them on account of their age.

The dismissal of petitioners' claims did not result solely from a holding that petitioners had failed to establish a prima facie case. Both the district court and the court of appeals concluded that petitioners "failed to produce sufficient evidence to establish a prima facie case of age discrimination, and . . . failed to prove that Rohm and Haas' stated reasons for adopting the new hiring criteria and not hiring [petitioners] were merely pretextual." App. 2a (emphasis added). In addressing the issue of pretext, and the issue of whether age "actually played a role in [the decisionmaking] process and had a determinative influence on the decision," Hazen Paper Co. v. Biggins, 506 U.S. 604, 610 (1993), both courts closely scrutinized all of petitioners' evidence and after doing so "determined that [respondent's] implementation of the criteria was not motivated by discriminatory motive, [and that petitioners

were not] treated in a way that gives rise to an inference of age discrimination." App. 14a.[17]

It is for this reason that petitioners' contentions about the importance of not "conflating the distinct stages of the McDonnell Douglas inquiry" (Petition p. 21 n. 10) miss the point. As petitioners purport to recognize, but then proceed to ignore, what matters in any discrimination claim is "the ultimate question [of] discrimination vel non." St. Mary's Honor Center, 509 U.S. at 518, quoting Aikens, 460 U.S. at 714. Petitioners' prima facie case arguments would elevate the McDonnell Douglas/Burdine analysis to the level of statutory writ, something this Court has emphasized should not be done. St. Mary's Honor Center, 509 U.S. at 515 (it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code."). None of the petitioners' pretext arguments demonstrate any issue which warrants review by this Court. Again, at most the petition contends (but fails to establish) that the Sixth Circuit erred in its application of the pretext analysis.

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[17] The analysis used by the district court and the Sixth Circuit is consistent with Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000), one of the decisions on which petitioners rely. The Cline court said, "[o]f course, if [plaintiff] fails to rebut the nondiscriminatory reason, she loses the suit on that ground - but it is technically incorrect to rule that she failed at the prima facie stage." Id. at 664. And further: "Plaintiffs who lack evidence undermining the reasons articulated for their terminations will falter on summary judgment after a set amount of discovery – just as before." Id. at 664-665, n.8. Here, petitioners failed at both the prima facie stage and the pretext stage, as did the plaintiffs in McDonald v. Union Camp Corp., 898 F.2d 1155, 1160 (6th Cir. 1990), and Ang v. Proctor and Gamble Co., 932 F.2d 540, 548-49 (6th Cir. 1991), both of which were cited in Cline.

The petition makes several conclusory assertions that the Sixth Circuit improperly "weighed and disregarded the petitioners' evidence" (p. 14), failed to "view all of the evidence in the context of the entire record" and "reject[ed] entirely the petitioners' additional evidence of pretext from supporting affidavits." Petition p. 16, see also p. 10. These conclusory assertions rest, apparently, upon petitioners' argument that the court of appeals "improperly infers that if some members of the protected group did not suffer discrimination then this shows a lack of motivation to discriminate against the petitioner." Petitioners claim the court of appeals used this finding to "immunize" the respondent from a finding of discrimination. Petition p. 17 & n. 8.

The Sixth Circuit's decision cannot be read in this way. Taken in context, the passage petitioners find offensive merely explained why petitioners' statistical evidence did "not necessarily support a claim of age discrimination." App. 12a-13a. The Sixth Circuit did not rely solely upon the fact that some of the applicants hired under the new hiring criteria were 40 years of age or older. And in any event, the Sixth Circuit correctly applied the very decision on which the petitioners rely, Furnco Construction, 438 U.S. at 580. In that decision, the Court held that evidence of a racially balanced workforce or that the workforce contained a disproportionately high percentage of minority employees was "not wholly irrelevant on the issue of intent."

Petitioners also argue that the lower courts applied a "pretext plus" theory by improperly rejecting affidavits from "Rohm & Haas trainers and supervisors which disputed the respondent's 'non-discriminatory reason' and

demonstrated pretext." Petition p. 9-10. Aside from the factual inaccuracy of these assertions, the alleged misapplication of these principles does not warrant granting the petition. Once again, however, the petition is inaccurate because the lower courts properly found the affidavits offered by the petitioners' "missed the point," i.e., failed to establish a genuine issue of material fact. App. 11a-12a.[18]

The Sixth Circuit held the affidavits failed to create an issue of fact because of the "affiants limited experience training and working with employees hired under the new criteria." The Sixth Circuit further explained that the affidavits "merely revealed reasonable differences in opinion" regarding the respondent's business decision to adopt what the Sixth Circuit found to be "hiring criteria [which were] neutral on their face." App. 11a-12a.

The district court's discussion of the affidavits establishes that the assertions relied upon by petitioners were either not based upon personal knowledge, Fed. R. Civ. P. 56(e),[19] or were merely conclusory allegations which at

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[18]Petitioners' argument that the court of appeals improperly "weighed" the evidence fails to understand that in ruling on a motion for summary judgment a court must assess the sufficiency of the evidence in order to determine whether there is a genuine issue for a trier of fact. In Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249 (1986), the Court held that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."

[19] For example, in Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 659-60 (7th Cir. 1991), the court of appeals held that affidavits offered in response to a summary judgment motion must be based upon personal knowledge and that any "inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about

best amounted to an impermissible attempt to substitute the affiants' business judgment for respondent's managers. App. 41a-42a.

The treatment of the affidavits by the lower courts presents no issue warranting this Court's review. In the face of the specific reasons given by respondent for adopting the facially age neutral hiring criteria, the assertions in these affidavits failed to controvert material facts. This Court's statement, that when ruling on a motion for summary judgment, "a District Court must resolve any factual issues of controversy in favor of the nonmoving party" applies "only in the sense where the facts specifically averred by that party contradict facts specifically averred by the movant." Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990). The object of Rule 56 "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." Id.

Furnco Construction, 438 U.S. at 578, held that a court may "not require[] businesses to adopt what it perceives to be the 'best' hiring procedures." Neither the ADEA nor Title VII was intended to "diminish traditional management prerogatives." Burdine, 450 U.S. at 257.[20]

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matters remote from that experience." Otherwise, "[d]iscrimination law would be unmanageable if disgruntled employees . . . could defeat summary judgment by affidavits speculating about the defendant's motives."

[20] In Burdine, the Court also emphasized that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. Loeb v. Textron, Inc., [600 F.2d 1003, 1012 n. 6 (1st Cir. 1979)]; see Lieberman v. Gant, 630 F.2d 60, 65 (CA2 1980)." In the footnote cited by this Court, the court of appeals in Loeb held that "[w]hile

Finally, petitioners' claim that the Sixth Circuit treated an applicant pool comprised of "older" former employees less favorably than it did an applicant pool of "younger" community college students borders on the frivolous both because it misstates the evidence and ignores this Court's holding in Hazen Paper, 507 U.S. at 612.

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an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination." In Lieberman, 630 F.2d at 65, the court of appeals held that simply showing the employer made a mistake was not enough to establish that the employer illegally discriminated against an employee. Rather, the employee must establish that the employer's decision "was so ridden with error that defendant could not have honestly relied upon it." (emphasis added). This principle is well-settled. Keyes v. Secretary of the Navy, 853 F.2d 1016, 1026 (1st Cir. 1988) ("Errors in judgment are not the stuff of Title VII transgressions"); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 531 (3rd Cir. 1992) (barring discrimination, "a company has the right to make business judgments on employee status"); EEOC v. Clay Printing Co., 955 F.2d 936, 946 (4th Cir. 1992) (federal courts should "not . . . direct the business practices of any company"); Bienkowski v. American Airlines, 851 F.2d 1503, 1508 (5th Cir. 1988) ("The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated."); Wilkins v. Eaton Corp., 790 F.2d 515, 521 (6th Cir. 1986), on petition for rehearing, 797 F.2d 342 (court may not focus on the soundness of the employer's business judgment.); Kralman v. Illinois Dept. of Veterans' Affairs, 23 F.3d 150, 156 (7th Cir. 1994); Gill v. Reorganized School District, 32 F.3d 376, 379 (8th Cir. 1994); Sanchez v. Philip Morris Inc., 992 F.2d 244, 247 (10th Cir. 1993) ("Title VII is not violated by the exercise of erroneous or even illogical business judgment.") Alphin v. Sears, Roebuck & Co., 940 F.2d 1497, 1501 (11th Cir. 1991) (a federal court may "not sit as a super-personnel department that reexamines an entity's business decisions.") Fischbach v. District of Columbia Dep't of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (correctness or desirability of employer's reasons was not the issue).

Contrary to petitioners' assertion, an employer may legitimately impose what are facially neutral criteria: a relevant associates degree or college degree. Hazen Paper (a seminal decision petitioners ignore) established that the ADEA only "requires the employer to ignore an employee's age. . . . it does not specify further characteristics that an employer must also ignore." 507 U.S. at 612.[21] For this reason, the Sixth Circuit correctly recognized that "there is no indication that older students could not enroll in the [community college] program, nor that older graduates of the program that applied for chemical operator positions were denied employment." App. 13a.

None of the petitioners' allegations establish that the courts below misapplied the McDonnell Douglas/Burdine test but in any event, the petitioners have failed to come forward with specific facts from which a reasonable finder could conclude that petitioners were not hired because of their age.

II.

The Issues in the Instant Case are Not Similar To Those In Reeves v. Sanderson Plumbing Products, Inc., and do Not Warrant Granting the Petition

Reeves v. Sanderson Plumbing Products, Inc., 197 F.3d 688 (5th Cir. 1999), cert. granted no. 99-536, is an ADEA case that resulted from a discharge for an alleged failure in performance. After the jury returned a verdict in favor of plaintiff, the district denied defendant's motion for

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[21] If anything, it is the petitioners who, by assuming that only younger individuals will have an associates (or college) degree, have engaged in stereotyping individuals based upon their age.

judgment as a matter of law. On appeal, the Fifth Circuit held that a reasonable jury could have found the employer's explanation for discharging Reeves was pretextual. (In Reeves it was undisputed that the plaintiff had established a prima facie case.) The court of appeal explained, however, that the evidence, which included age-related statements, was insufficient to establish that Reeves' discharge was motivated by his age. Accordingly, it reversed the district court's judgment and rendered judgment in favor of defendant.

In contrast, the present case resulted from the adoption of hiring criteria and from respondent's decision not to employ petitioners because they did not meet any of the criteria. In considering the issues of qualification and pretext, the courts found that petitioners were not qualified in terms of the facially neutral hiring criteria and that there was no evidence that respondent had adopted or applied the criteria as a pretext for age discrimination. This case does not involve any age-related comments.

Reeves and the present case are not "companion" cases: the obvious differences between these two cases demonstrate why granting review in this fact bound appeal would be improvident. These two cases do not complement each other. Petition p. 11. Petitioners are in error in suggesting that there is a need for this Court to "harmonize" the principles relating to summary judgment under Rule 56 with judgment as a matter of law under Rule 50 as this question has already been answered. In "essence. . . the inquiry under each rule [Rule 50 and Rule 56] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided

that one party must prevail." Anderson, 477 U.S. at 251-52.[22]

Conclusion

For these reasons, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[22]In Anderson, this Court went on to observe that the summary judgment standard "mirrors the standard for a directed verdict." Id. at 250. Indeed, after Anderson, Rule 50 was amended (in 1991) to expressly incorporate the summary judgment concept of granting "judgment as a matter of law" on any issue in which there "is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed.R.Civ.P. 50(a)(1). As explained in the commentary to the 1991 amendments, the use of the phrase "judgment as a matter of law. . . in Rule 50 calls attention to the relationship between the two rules." See 1991 Advisory Comm. Notes, 134 F.R.D. at 684.